FILED
United States Court of Appeals
Tenth Circuit

July 7, 2016

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: LAURA SHOOP, Movant.	No. 16-3217 (D.C. Nos. 2:15-CV-09221-KHV & 2:12-CR-20099-KHV-2) (D. Kan.)

ORDER

Before **TYMKOVICH**, Chief Judge, **LUCERO** and **HARTZ**, Circuit Judges.

Laura Shoop seeks authorization to file a successive 28 U.S.C. § 2255 motion to vacate, set aside or correct her sentence. In order to be eligible for authorization, Ms. Shoop must show that the successive § 2255 claim she seeks to file relies on either:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255(h).

Ms. Shoop seeks to bring a new claim for ineffective assistance of counsel. She contends that her claim relies on a new rule of law and she cites to *United States v. Abney*, 812 F.3d 1079 (D.C. Cir. 2016). In *Abney*, the D.C. Circuit held that the defendant was denied his Sixth Amendment right to effective assistance of counsel. *Id*. at 1083. That court applied the two-prong test identified in *Strickland v. Washington*, 466 U.S. 668 (1984), and concluded that the failure to seek a continuance when a change

to the sentencing law was about to take effect was objectively unreasonable. *See id.* at 1082. The court further concluded that the failure to seek a continuance prejudiced the defendant because, if a continuance had been granted, defendant's mandatory minimum sentence would have been reduced by half. *See id.*

Even if we were to assume that *Abney* involved a new rule of constitutional law,[1] and that a decision from a court of appeals—and not the Supreme Court—could provide the basis to authorize a second or successive claim, the Supreme Court has not made *Abney* retroactive to cases on collateral review. Ms. Shoop has therefore failed to satisfy the requirement for authorization in § 2255(h)(2). *See In re Gieswein, 802 F.3d 1143, 1148-49 (10th Cir. 2015)* (per curiam) (explaining that Supreme Court must hold that a new rule of constitutional law is retroactive to cases on collateral review in order to satisfy the requirement for authorization in § 2255(h)(2)).

[1] In *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013), the Supreme Court explained that "garden-variety applications of the test in *Strickland* . . . for assessing claims of ineffective assistance of counsel do not produce new rules." But the Court concluded that its decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), did announce a new rule. *See id.* at 1111. Even though *Padilla* involved the application of *Strickland*, the Court explained that "*Padilla* had a different starting point. Before asking whether the performance of Padilla's attorney was deficient under *Strickland*, we considered . . . whether *Strickland* applied at all." *Id.* at 1110. We need not resolve in this matter whether the D.C. Circuit's decision in *Abney* involved a garden-variety application of *Strickland* or whether it "did something more" like the decision in *Padilla*, *id.* at 1108.

Accordingly, we deny her motion. This denial of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

ELISABETH A. SHUMAKER, Clerk